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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY JEROME HOLMES, Defendant and Appellant.	B222830 (Los Angeles County Super. Ct. No. BA354999)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig Veals, Judge. Affirmed as modified.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Charles S. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Anthony Jerome Holmes appeals from a judgment entered after he pled no contest to a violation of Health and Safety Code section 11352, subdivision (a). He contends that he is entitled to additional presentence custody credits, computed under a retroactive application of the 2009 amendment to Penal Code section 4019. We agree that appellant is entitled to additional credits. We thus modify the sentence to include them, and affirm the judgment as modified.

BACKGROUND

In May 2009, appellant was charged by felony information with having transported, sold, or furnished a controlled substance, cocaine, on April 3, 2009. The information alleged, for purposes of Penal Code section 667.5, subdivision (b),[1] that appellant had suffered four prior convictions of violating Health and Safety Code section 11352 and one prior conviction of violating Vehicle Code section 10851, and that he had not remained free of prison for five years on those convictions. In addition, the information alleged, for purposes of Health and Safety Code section 11370.2, subdivision (a), that appellant had suffered five prior convictions of violating Health and Safety Code section 11352.

On December 28, 2009, appellant pled no contest to the charge, and the allegations regarding prior convictions were dismissed. His plea was made pursuant to a plea bargain under which he would be sentenced to the middle term of four years in prison and he would receive his presentence custody credits. After the trial court sentenced defendant as agreed, the trial court granted credits totaling 405, composed of 270 actual days, and 135 good time/work time credits.

On February 16, 2010, appellant filed a timely notice of appeal challenging the validity of the judgment, and applied for a certificate of probable cause. The trial court denied the application March 12, 2010. While this appeal was still pending and before appellant filed his opening brief, defendant filed a motion in the superior court to correct

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

the award of presentence custody credits due under section 4019, to a total of 540 days. The superior court denied the motion.

Appellant then filed his opening brief, stating that he does not challenge the validity of the plea. He seeks only a correction of the number of presentence custody credits awarded.[2]

DISCUSSION

Appellant contends that he is entitled to additional presentence conduct credits, calculated under amended section 4019. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28X, § 50.) Appellant committed his crime in April 2009, and was convicted and sentenced December 28, 2009. On January 25, 2010, section 4019 was amended to increase the presentence conduct credits to which a defendant is entitled.[3] Although the amended statute contains no express declaration of retroactivity or a saving clause, appellant contends that the amendment applies retroactively to all cases not yet final as of January 25, 2010, when the statute became effective. We agree.[4]

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[2] The prosecution's offer had been three years in prison with no presentence custody credits, but defendant counter-offered to serve four years and receive credits. As appellant bargained for a sentence of four years, with an award of all custody credits due him, a correction of the credits awarded after his plea would not affect its validity, and thus no certificate of probable cause is required to pursue this appeal. (See *People v. Buttram* (2003) 30 Cal.4th 773, 780; § 1237.5; Cal. Rules of Court, rule 8.304(b)(4)(B).)

[3] Section 4019 has since been amended again, effective September 28, 2010. Because the latest version applies only to crimes committed after its effective date, we address appellant's argument under the version of section 4019 that took effect on January 25, 2010 (interim version).

[4] The question whether amended section 4019 is to be applied retroactively to cases pending at the time it became effective has been the subject of numerous appellate court decisions with no clear consensus, and which are now pending before our Supreme Court. (See, e.g., *People v. Brown* (2010) 182 Cal.App.4th 1354 [favoring retroactivity], review granted June 9, 2010, S181963; *People v. Rodriguez* (2010) 183 Cal.App.4th 1 [against retroactivity], review granted June 9, 2010, S181808.)

Pursuant to section 2900.5, a person sentenced to state prison is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a).) In addition, section 4019 provides that a defendant may earn additional presentence credit against a sentence for work performance and good behavior. (§ 4019, subds. (b), (c).) Collectively, these forms of presentence credit are known as "'[c]onduct credit.'" (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) When appellant was sentenced, former section 4019 provided that he would be deemed to have served six days for every four days of actual presentence custody. (See former § 4019, subds. (b), (c), (f); Stats. 1982, ch. 1234, § 7, p. 4553.) Under the amended section 4019, effective January 25, 2010, he would be deemed to have served four days for every two days of presentence custody, as long as he was eligible. (See former § 4019, subd. (f); Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28X, § 50.)

Section 3 provides that "[n]o part of it is retroactive, unless expressly so declared." Thus, "in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209.) However, there is an exception in criminal cases when an "amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final . . . ." (*In re Estrada* (1965) 63 Cal.2d 740, 744 (*Estrada*).) In such cases, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id.* at p. 748; see also *Evangelatos v. Superior Court*, *supra*, at p. 1210, fn. 15.)

Respondent argues that the Legislature must have intended prospective application, because credits can encourage working and behaving well only if they operate prospectively. Respondent infers such a holding from a comment in *In re Stinnette* (1979) 94 Cal.App.3d 800 (*Stinnette*), that "[r]eason dictates that it is impossible to influence behavior after it has occurred." (*Id.* at p. 806.) However, the

Stinnette court was construing an amendment to section 2931, which expressly provided for prospective application—to time served after its effective date. (*Stinnette*, *supra*, at pp. 803–804.) The issue before the court was whether this prospective application violated equal protection, not whether the *Estrada* exception to section 3 was applicable, and the court concluded that it did not. (*Stinnette*, *supra*, at pp. 805–806.) Unlike the amendment to section 2931 in *Stinnette*, the current amendment to section 4019 does not specify the Legislature's intent as to retroactive or prospective application; thus, *Stinnette* is not relevant to determining the Legislature's intent when amending section 4019.

Long before the current amendments to section 4019, the *Estrada* exception has been applied to amendments awarding greater presentence custody and conduct credits. (*People v. Smith* (1979) 98 Cal.App.3d 793, 798–799 [amended 4019 applicable to probationer]; *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239 (*Doganiere*) [conduct credits under amended section 4019]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 392 (*Hunter*) [custody credit under section 2900.5].) Respondent suggests that *Doganiere* was wrongly decided, and that *Hunter* is inapplicable, as it dealt with actual credit, not conduct credit. Respondent argues that cases such as *Doganiere* ignore the purpose of conduct credits—to motivate and encourage good behavior, in order to promote good prison discipline and safety. (See, e.g., *People v. Silva* (2003) 114 Cal.App.4th 122, 127–128).

Since the publication of *Doganiere*, the Legislature twice amended section 4019, in 1982 and 2009, without expressly providing that the amendments would apply prospectively only. (Stats. 1982, ch. 1234, § 7, p. 4553; Stats. 2009-2010, 3d Ex. Sess., ch. 28X, § 50.) We presume that the Legislature was aware of *Doganiere*, and that because it has taken no action to abrogate it, the Legislature has approved of applying the *Estrada* exception in such cases. (Cf. *People v. Meloney* (2003) 30 Cal.4th 1145, 1161.) Further, the Legislature has taken no action to abrogate *Estrada*, and the California Supreme Court has refused, on that ground, to revisit the *Estrada* exception. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792, fn. 7.)

Moreover, section 4019 already provided incentives for good behavior prior to its amendment, but the purpose of the 2009 amendment was apparently to reduce prison costs, as Senate Bill No. 28 expressly states that its enactment would address the fiscal emergency declared by the Governor. (See Stats. 2009-2010, 3d Ex. Sess., ch. 28X, § 50.) Applying it prospectively would not address the fiscal emergency declared by the Governor, whereas applying the amendment retroactively will lower the prison costs by permitting the earlier release of more prisoners.

We find an additional indication of the Legislature's intent in the fact that the same legislation included a saving clause in section 2933.3, subdivision (d), by providing additional custody credits for prison inmate firefighting training or service, only for those eligible after July 1, 2009. The inclusion of a saving clause in that section, but not in the amendment to section 4019, supports an inference that the Legislature had a different intent with respect to the retroactive application of the two provisions.

Because we conclude that amended section 4019 applies retroactively to appellant, additional presentence conduct credits must be granted. Because credits were given in sets of two days in the amended statute, the actual time in custody is divided by two, resulting in 135 days; four days are given for each set of two days, so long as the defendant was eligible.[5] (See former § 4019, subd. (f); Stats. 2009-2010, 3d Ex. Sess., ch. 28X, § 50.) Appellant spent 270 days actual time in local custody prior to sentencing. Dividing 270 by 2 results in 135. Multiplying 135 days by 2 days results in 270 days of conduct credit. We shall modify the judgment accordingly.

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[5] Ineligible under the 2009 statute for the increased credit were those required to register as a sex offender, had committed a serious felony (as defined in section 1192.7), or who had a prior conviction for a serious or violent felony. (§ 4019, subds. (b)(2) & (c)(2); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.) Because the probation report indicates that in Superior Court case No. YA057384, appellant was charged with assault with a deadly weapon (§ 245, subd. (a)(1)), we granted appellant's request to take judicial notice of the minutes in that case, which show that appellant was charged only with a violation of section 11350, subdivision (a), unlawful possession of a controlled substance. The remainder of appellant's criminal history, as reflected by the probation report, consists of narcotics violations.

DISPOSITION

The judgment is modified to award a total of 540 days of presentence credit, which includes 270 days actual time and 270 days conduct credit. The judgment is affirmed as modified. The trial court is directed to prepare an amended abstract of judgment reflecting a total presentence credit of 540 days, and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

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_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
CHAVEZ